



**STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
DEPARTMENT OF AUDIT
DIVISION OF MUNICIPAL AUDIT**

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Dennis F. Dycus, CPA, CFE, Director
Division of Municipal Audit

June 26, 2002

Honorable Mayor and Members of the
Board of Aldermen
Town of Greenbrier
P. O. Box 466
Greenbrier, TN 37073

Dear Mayor and Board of Aldermen:

As requested by Mayor Sonny Jones, this office has reviewed the records provided by Greenbrier Public Works Director, Tommy Maitland, related to the opening and awarding of bids for sanitation pick-up service by the members of the mayor and board of aldermen. The following records were reviewed:

1. Bid specifications for sanitation pick-up service
2. Bids for sanitation pick-up service
 - a. Denson Disposal Service
 - b. Hudgins Disposal, Inc.
 - c. Kleen-Way Disposal
3. Copies of portion of minutes of the May 28, 2002, meeting of the Town of Greenbrier mayor and board of aldermen
4. Copies of portion of minutes of the June 3, 2002, meeting of the Town of Greenbrier mayor and board of aldermen

As a result of the review, the following points were noted:

1. Based on a review of provided copies of the minutes of the May 28, 2002, meeting of the mayor and board of aldermen, the town received three bids for sanitation pick-up service. According to the list printed in the minutes, Clean Way (Kleen-Way)

Disposal submitted the lowest bid. The board voted to table the award of the sanitation service contract to the monthly meeting on June 3, 2002.

2. Based on our review and analysis of the bids submitted, Kleen-Way Disposal appeared to be the lowest bidder by over \$32,000 for the 5-year life of the proposed contract. Our analysis of the bid proposals for sanitation pick-up based on the approximated 1,700 customers in the bid specifications is shown below:

	Kleen-Way	Hudgins	Denson
Base per pickup per month	\$ 11.17	\$ 11.24	\$ 13.75
Annual increase	3%	4%	0%
Year 1	\$ 227,868.00	\$ 229,296.00	\$ 280,500.00
Year 2	234,704.04	238,467.84	280,500.00
Year 3	241,745.16	248,006.55	280,500.00
Year 4	248,997.52	257,926.82	280,500.00
Year 5	<u>256,467.44</u>	<u>268,243.89</u>	<u>280,500.00</u>
Total	<u>\$1,209,782.16</u>	<u>\$1,241,941.10</u>	<u>\$1,402,500.00</u>

3. Based on a review of provided copies of the minutes of the June 3, 2002, meeting of the mayor and board of aldermen, the sanitation pick-up bids were reviewed aloud by the mayor, then the board voted to award the contract to Hudgins Disposal. There was no documentation in the minutes that any of the bids were rejected for any reason. In addition, there was no documentation as to why the board did not select the lowest bidder which, as noted above, appeared to be Kleen-Way Disposal.

Chapter 207 of the 1996 *Tennessee Private Acts*, sets forth the current basic charter for the Town of Greenbrier, Tennessee. Section 20 of this act states:

No purchase, lease or lease-purchase calling for an expenditure exceeding two thousand five hundred dollars (\$2,500) shall be awarded until after advertisement for one (1) week in the way or manner to be prescribed by the board for sealed bids, and then shall go only to the lowest and best bidder...

The *Internal Control and Compliance Manual for Tennessee Municipalities*, Title 2, Chapter 1, page 15, states, "When a contract is not awarded to the lowest bidder, the reasons should also be documented."

Honorable Mayor and Members of the Board of Aldermen
Town of Greenbrier
June 26, 2002
Page 3

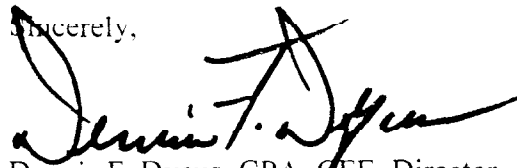
The documentation provided by the Town of Greenbrier indicated that members of the mayor and board of aldermen did not award the sanitation pick-up contract to the lowest bidder. In addition, the minutes did not include documentation that any of the bids were rejected, or indicate any other reason the bid was not awarded to the lowest bidder. As a result, our review of provided documentation revealed that members of the Town of Greenbrier mayor and board of aldermen did not follow proper procedures in awarding the contract for sanitation pick-up service.

When asked why the contract was awarded to Hudgins Disposal, even though town's minutes and related bid documentation indicated that Kleen-Way Disposal was the lowest bidder, public works director, Tommy Maitland, stated that the Kleen-Way Disposal bid did not meet the requirements of Specification #15. This specification stated that the town needed 8 large compactor trucks for clean-up day possibly twice a year and that an additional fee would be paid by the town for this service. The Kleen-Way bid stated that "During clean-up days I will furnish 4 packer trucks to be dumped and returned as necessary to complete the 8 loads or as needed." (As noted above, the town's minutes do not reflect that members of the mayor and board of aldermen rejected Kleen-Way Disposal's bid because of this reason.)

In Opinion 99-204, (copy attached) the Tennessee Attorney General stated that "Rejection of the **lowest bid** is a risky option and may invite a lawsuit." This opinion sets forth factors which should be considered in the determination of "lowest and best bidder."

We recommend that the mayor and members of the board of aldermen comply with the Town of Greenbrier charter and award competitive bids to the "lowest and best bidder." When a bid is rejected, or a contract is not awarded to the lowest bidder, the reason(s) should be documented in the minutes of the related meeting of the mayor and board of aldermen. The board should consider the factors mentioned in Attorney General Opinion 99-204, in the determination of "lowest and best bidder."

If you have questions or need additional information, please contact me.

Sincerely,

Dennis F. Dycus, CPA, CFE, Director
Division of Municipal Audit

Office of the Attorney General
State of Tennessee

*1 Opinion No. 99-204
October 14, 1999

School Building Project Bids

The Honorable Stancil Ford
State Representative
108 War Memorial Building
Nashville, TN 37243

QUESTIONS

Fact Situation

A school board advertises for bids on two (2) school building projects with separate bids being received for each school and each major category. There is a budget for each school, but not a separate budget for each major category. The HVAC bid form specifies a bid for a base system and an add alternative bid for an energy management control system. Bidders are pre-qualified, and two (2) bids are received on the HVAC category at each school. Bidder "A" tenders a base bid and a bid of zero for the add alternate, explaining that the equipment quoted in the base bid includes an energy management control system. Bidder "A" further explains that if the alternative bid is not accepted, the control system would still be provided since it is an integrated part of the equipment proposed. Bidder "B" tenders a base bid and a separate bid as an add alternate. Several days after the bid opening, Bidder "B" explains that his base bid includes the add alternate bid and that the add alternate bid specified on the bid submittal form is actually a "break out" of the cost for the energy management control system.

Comparing base bid to base bid, Bidder "A" is lower on one (1) school, and Bidder "B" is lower on one (1) school. If the add alternate is added to Bidder "B's" package bid on both schools, Bidder "B" is higher on both schools. If Bidder "B" is allowed to treat the alternate as being a part of his base bid, (as he claims was intended), Bidder "A" is lower on one (1) school and Bidder "B" is lower on the other school, and both schools get an energy management control system.

A similar situation exists with the electrical sub-contract. There are no disputes with the other subcontracts.

1. Can Bidder "B" correct, modify or explain his bid (after the opening of the bids) by stating that the add alternative is included in his base bid.

2. Can the Board of Education elect to negotiate directly with bidder "A" or "B" to do the work on both projects, or must the contracts be awarded separately to the successful bidders?

3. Can the Board of Education reject all bids on the HVAC and electrical contracts and re-bid only those categories; or, if any re-bidding is to be done, must the entire project base bid?

OPINIONS

1. Generally, a bidder may not modify its bid after the bids have been opened.

2. Tenn. Code Ann. § 49-2-203(a)(4)(C)(1) requires that the county board of education receive competitive bids for the construction of school buildings or additions to existing buildings, for costs exceeding \$10,000, provided, however, that in the event no bid is within the budgetary limits set by the board for such construction, the board may negotiate with the lowest and best bidder to bring the cost of construction within the funds available, with the approval of the commissioner of education. Therefore, under the facts presented, negotiation to award both contracts to one bidder is not allowed and the contracts should be awarded separately to the successful bidder(s).

*2 3. In order to successfully defend a challenge to a decision to reject all bids, the Board of Education must have a reasonable or rational basis for its decision to reject all bids. Relying on the facts presented that separate bids were "received for each school and each major category," any rebid would involve only the affected categories, unless the Board of Education found the invitation to bid for the entire project was materially defective, and therefore, the entire project would need to be re-bid.

ANALYSIS

1. This Office has not reviewed the invitation to bid which may contain provisions addressing these issues of modification and/or error in the bid. The invitation to bid, therefore should be reviewed. Most, if not all, solicitation documents, however, do not allow modification of bids after opening. This Office has opined that a bidder may not modify its price or cost after the bids have been opened. Op. Tenn. Atty. Gen. 78-64 (February 6, 1978). Therefore, assuming that the invitation to bid does not provide otherwise, a bidder may not correct, modify or explain his bid (after the opening of the bids) by stating that the add alternative is included in his base bid he is changing the cost after the fact.

2. Tenn. Code Ann. § 49-2-203(a)(4)(C)(1) provides that:

No county board of education shall contract for the construction of school buildings or additions to existing buildings, the expenditure for which is in excess of ten thousand dollars (\$10,000) except when such contract be made after competitive bids. Public notice shall be given at least ten (10) days in advance of accepting bids for such construction, and the board shall award the contract to the lowest and best bidder. In the event no bid is within the budgetary limits set by the board for such construction, the board may negotiate with the lowest and best bidder to bring the cost of the construction within the funds available, with the

approval of the commissioner of education.

Therefore, under the facts presented, negotiation to award both contracts to one bidder is not allowed and the contracts should be awarded separately to the successful bidder(s).

3. The invitation to bid may contain provisions addressing the Board of Education's right to reject all bids. The invitation to bid, therefore, should be reviewed. Nonetheless, in order to successfully defend a challenge to a decision to reject all bids, the Board of Education must have a reasonable or rational basis for its decision to reject all bids. The Computer Shoppe, Inc. v. State of Tennessee, 780 S.W.2d 729, 737 (Tenn. Ct. App. 1989).

This Office has discussed factors that should be considered when an awarding body considers rejecting all bids in Op. Tenn. Atty. Gen. 81-295 (May 7, 1981):

Rejection of the lowest bid is a risky option and may invite a lawsuit. If it is thought, however, that this must be done, there are certain factors that the commission may take into account. In Owen of Georgia, Inc. v. Shelby County, 442 F. Supp. 314 (W.D. Tenn. 1977), the court mentioned the following factors in considering a similar situation under a private act which provided that bids could be rejected "for good cause:"

- *3 a. A bidder who is not "financially responsible."
- b. a bidder who offers to furnish inferior quality merchandise or material,
- c. a bidder whose proposal is not in conformity to specifications,
- d. a bidder who offers supplies or articles that are "not suitable to the requirements," and
- e. a bidder whose delivery terms are objectively inferior or substantially less desirable than another acceptable bidder. Id. at 320.

The court went on to quote IA J. Antieau, Municipal Corporation Law, § 10.43 (1974 and 1977 Supp.), for the proposition that the awarding body can consider "financial ability, skill, integrity, judgment, experience, reputation, previous conduct on similar contracts, as well as any other factor reasonably relevant to a bidder's successful performance of his contract." 442 F. Supp. at 321.

The Antieau quotation in turn quoted a New Jersey court as holding that "'to reject the bid of the lowest bidder there must be such evidence of the irresponsibility of the bidder as would cause fair-minded and reasonable men to believe that it was not for the best interest of the municipality to award the contract to the lowest bidder.'" Id.

It is, therefore, the opinion of this Office that the above-mentioned factors from Owen should be considered if the county board of education does think it necessary to reject a low bid for the school construction projects.

Finally, relying on the facts presented that separate bids were "received for each school and each major category," any re-bid would involve only the affected categories, unless the Board of Education found the invitation to bid for the entire project was materially defective, in which case the entire project would need to be re-bid. Of course, this conclusion is subject to the actual terms of the invitation to bid that may state otherwise.

Paul G. Summers

Tenn. Op. Atty. Gen. No.
Tenn. Op. Atty. Gen. No. 99-204
(Cite as: 1999 WL 1012983 (Tenn.A.G.))

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Solicitor General

Janie C. Porter

Assistant Attorney General

Tenn. Op. Atty. Gen. No. 99-204, 1999 WL 1012983 (Tenn.A.G.)

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